IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KEVIN M. WENTZ, Appellant.	No. 38327-6-II
STATE OF WASHINGTON, Respondent, v. MARK ALAN CRUTCHFIELD, Appellant.	(consolidated with 38455-8-II) UNPUBLISHED OPINION

Quinn-Brintnall, J. — Kevin Wentz and Mark Crutchfield challenge the constitutionality of a condition of the community supervision portion of their sentences stating that the Department of Corrections (DOC) or a community corrections officer (CCO) may make a "visual inspection of all areas of the residence in which the defendant lives and/or has

exclusive or joint control or access." Clerk's Papers (CP) (Wentz) at 13; CP (Crutchfield) at 6-7. Because Wentz and Crutchfield have not demonstrated that they have been harmed as a result of any actual searches performed under the authority granted under the challenged community supervision condition, their challenges are not ripe for review and we dismiss their appeals.

FACTS

Kevin Wentz

On November 2, 2007, the Mason County Prosecuting Attorney's office charged Wentz with two counts of second degree unlawful possession of a firearm, a Class C felony under RCW 9.41.040(2)(b), and one count of unlawful possession of a controlled substance with intent to deliver (marijuana), a Class C felony under RCW 69.50.401(2)(c), or, in the alternative, one count of unlawful possession of a controlled substance (marijuana) over 40 grams, a Class C felony under RCW 69.50.4013. On August 4, 2008, Wentz pleaded guilty to unlawful possession of a controlled substance with intent to deliver (marijuana) and one count of second degree unlawful possession of a firearm.

On September 8, 2008, Wentz, who had an offender score of 1, was sentenced to five and a one-half months confinement with the possibility of home detention for the last thirty days. The sentencing court also imposed 12 months of community supervision for his unlawful drug possession conviction. The conditions of Wentz's community supervision stated in relevant part:

> The defendant shall consent to allow home visits by the DOC/CCO to monitor compliance with supervision. Home visits include access for purposes of visual inspection of all areas of the residence in which the defendant lives and/or has exclusive or joint control or access.

CP (Wentz) at 13. Wentz objected to this condition, claiming that it would constitute an unreasonable search because it does not require the DOC or CCO to have a reasonable suspicion that he is violating his sentence. The sentencing court indicated that it was a standard condition long used by the court. Wentz filed this timely appeal, challenging only the community supervision search condition set out above.

Mark Crutchfield

On April 16, 2008, the Mason County Prosecuting Attorney's office charged Crutchfield with one count of third degree assault, a class C felony under RCW 9A.36.031(2), and one count of first degree criminal trespass, a gross misdemeanor under RCW 9A.52.070(2). Crutchfield's charges stemmed from his intoxicated behavior at the Shelton Inn after its manager asked him to leave and the subsequent assault of a Shelton police officer.

On October 6, 2008, Crutchfield pleaded guilty to criminal trespass and the trial court diverted the assault charge. The trial court sentenced Crutchfield to 12 months confinement suspended for 24 months on conditions and community supervision.[1] The conditions of

[1] A superior court has the authority to suspend a sentence and impose community custody for a time "no later than the time the original sentence would have elapsed." RCW 9.92.060, .064. Gross misdemeanors carry a maximum jail sentence of 12 months, suggesting the maximum probationary period for gross misdemeanors cannot exceed 12 months. RCW 9A.20.021(2). But RCW 9.95.210(1) provides that a superior court sentencing a defendant on a gross misdemeanor may suspend the sentence and grant probation that "may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer." We have found no statutory provision similarly extending a district court's authority to designate more than 12 months of probationary supervision for gross misdemeanors.

Crutchfield's suspended sentence included the same search condition set out above to which Crutchfield objected unsuccessfully on the same grounds as Wentz. Crutchfield also filed a timely appeal challenging only the community supervision search condition.

ANALYSIS

Wentz and Crutchfield challenge the search condition of their community supervision, alleging that it authorizes warrantless and suspicionless searches in violation of their Washington constitutional rights. As a threshold question, we first review whether these claims are ripe for review. Wentz and Crutchfield assert their appeals are ripe and that their claims meet the three ripeness factors discussed in *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008).

In *Bahl*, our Supreme Court addressed whether a community custody condition to "not possess or access pornographic materials, as directed by the supervising [CCO]" was unconstitutionally vague.[2] 164 Wn.2d at 743. Our Supreme Court found Bahl's preenforcement challenge ripe for review because prohibiting Bahl from possessing pornography dealt with a purely legal issue (vagueness) that implicated Bahl's First Amendment rights. *Bahl*, 164 Wn.2d at 752-53. Thus, a reviewing court could resolve the legal vagueness issue without the need for a

[2] The community custody condition at issue in *Bahl* stated:

> Do not possess or access pornographic materials, as directed by the supervising [CCO]. Do not frequent establishments whose primary business pertains to sexually explicit or erotic material.
>
> Do not possess or control sexual stimulus material for your particular deviancy as defined by the supervising [CCO] and therapist except as provided for therapeutic purposes.

164 Wn.2d at 743.

factual context to aid the court's inquiry. *Bahl*, 164 Wn.2d at 752. The *Bahl* court recognized that all challenges to preenforcement community supervision conditions are not ripe for review on a direct appeal from the judgment and sentence when it set out a test to determine whether a challenge to preenforcement community custody conditions is sufficiently mature for review.

Under the *Bahl* test, a claim is mature when (1) the issues raised are primarily legal, (2) the issues do not require further factual development, and (3) the challenged action is final. 164 Wn.2d at 751. In addition, the reviewing court must also consider "'the hardship to the parties of withholding court consideration.'" *Bahl*, 164 Wn.2d at 751 (quoting *First United Methodist Church of Seattle v. Hearing Exam'r for Seattle Landmarks Pres. Bd.*, 129 Wn.2d 238, 255, 916 P.2d 374 (1996) (Dolliver, J. dissenting)).

But *Bahl* does not control our decision here. The sentencing conditions at issue here do not implicate Wentz's and Crutchfield's First Amendment rights and Wentz and Crutchfield do not contend that the challenged community supervision condition is too (unconstitutionally) vague to be enforceable. In contrast, the analysis Division One of this court set out in *State v. Massey*, 81 Wn. App. 198, 913 P.2d 424 (1996), is on all fours and informs our decision. *Bahl* cited and did not overrule *Massey*. 164 Wn.2d at 749.

In *Massey*, the defendant pleaded guilty to delivering cocaine and later sought to challenge a community custody condition that required him to "submit to testing and searches of [his] person, residence and vehicle by the [CCO] to monitor compliance." 81 Wn. App. at 199 (first alteration in original). Massey argued that the court's order was deficient because it did not

state that the searches must be based on a reasonable suspicion. *Massey*, 81 Wn. App. at 199-200. Division One held that Massey's challenge is "premature until he is subjected to a search that he deems unreasonable." *Massey*, 81 Wn. App. at 200. Division Three of this court adopted the *Massey* court's analysis in *State v. Autrey*, 136 Wn. App. 460, 470-71, 150 P.3d 580 (2006). Likewise, in *State v. Motter*, 139 Wn. App. 797, 804, 162 P.3d 1190 (2007), we held that a defendant must allege a harm, not a potential for harm, resulting from the application of a community custody condition limiting the prohibition and use of any drug paraphernalia before the record is sufficient and the issue ripe for review. Our Supreme Court denied review of *Motter.* 163 Wn.2d 1025 (2008).[3]

Here, neither Wentz nor Crutchfield have demonstrated that they have been subjected to any unreasonable searches as a result of the challenged community supervision condition.[4]

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[3] The Supreme Court did not address *Motter* in *Bahl*.

[4] Additionally, we note that release into community custody or probation is a privilege and not a right. *State v. Kuhn*, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972) (Courts allow probation not as a right, but as a rehabilitative measure "'granted to the deserving and withheld from the undeserving,' within the sound discretion of the trial judge.") (quoting *State v. Shannon*, 60 Wn.2d 883, 888, 376 P.2d 646 (1962), *overruled on other grounds by Mempa v. Rhay*, 68 Wn.2d 882, 416 P.2d 104 (1966)). Had the trial court exercised its discretion to immediately incarcerate Wentz and Crutchfield, rather than release them into community custody, they would have been subjected to the constant observation of jail staff. Moreover, a probationer has a reduced right to privacy and allowing a CCO to monitor a probationer's residence to insure compliance with legitimate conditions of probation is not an unconstitutional restraint. *See State v. Winterstein*, 167 Wn.2d 620, 628-29, 220 P.3d 1226 (2009); *see also Hocker v. Woody*, 95 Wn.2d 822, 826, 631 P.2d 372 (1981) (a parolee has diminished Fourth Amendment rights in his home and effects); *State v. Lucas*, 56 Wn. App. 236, 239-40, 783 P.2d 121 (1989), *review denied*, 114 Wn.2d 1009 (1990) ("Under the Fourth Amendment and article 1, section 7 of our constitution, probationers and parolees have a diminished right of privacy permitting a warrantless search if reasonable."); S*tate v. Lampman*, 45 Wn. App. 228, 233 n.3, 724 P.2d 1092 (1986) (Washington probationer has diminished right of privacy and can expect the State to "scrutinize him closely and search his person, home and effects on less than probable cause"). In fact, Washington Supreme Court cases suggest that the State may be liable for damages due to negligent supervision of a probationer where the probationer commits crimes. *See Joyce v. Dep't of Corr.*, 155 Wn.2d 306,

Furthermore, even under the *Bahl* "mature issue" test, Wentz's and Crutchfield's challenges are not ripe. We note that the law requiring that searches must be based on a reasonable suspicion of a violation of community custody applies unchanged.[5] *State v. Winterstein*, 167 Wn.2d 620, 628-29, 220 P.3d 1226 (2009). And reasonableness or reasonable suspicion is a legal conclusion based on the particular facts and circumstances surrounding the search in a given case. *See State v. Patterson*, 51 Wn. App. 202, 204-08, 752 P.2d 945 (performing a fact-based inquiry as to reasonableness of a search), *review denied*, 111 Wn.2d 1006 (1988). Because a fact-based inquiry regarding reasonableness is required, Wentz's and Crutchfield's challenges fail to satisfy the second *Bahl* maturity factor which requires there be no need for further factual development for review. 164 Wn.2d at 751. Accordingly, Wentz's and

321-23, 119 P.3d 825 (2005) (suggesting that when a CCO fails to properly monitor a probationer, the State may be liable for injuries resulting from the probationer's subsequent illegal activity); *see also Bell v. State*, 147 Wn.2d 166, 183, 52 P.3d 503 (2002) (listing the elements of a negligent parole supervision claim against the State and holding the plaintiff failed to show negligent supervision proximately caused her injuries); *Taggart v. State*, 118 Wn.2d 195, 227, 822 P.2d 243 (1992) (declining to hold as a matter of law that cause in fact could not be established in a negligent parole supervision claim because a reasonable jury might conclude that had a parole warrant been issued based on known parole violations, the plaintiff's injuries might not have occurred).

[5] Our Supreme Court's recent holding in *Winterstein* does not alter the standard for lawful searches of probationers. The rule that the search of a probationer requires "a well-founded or reasonable suspicion of a probation *violation*" remains. *Winterstein*, 167 Wn.2d at 628-29 (emphasis added). In *Winterstein*, our Supreme Court merely made clear that before a CCO may search a residence under this probationary search authority, the probation officer must have probable cause to believe that the residence to be searched is the probationer's residence. 167 Wn.2d at 636.

Crutchfield's appeals lack the factual context necessary to show harm to resolve the issue and are not ripe for our review. Accordingly, we dismiss their appeals.[6]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

I concur:

ARMSTRONG, J.

[6] We note that the requirements for searches of individuals on community supervision and the adjudicatory standards of review for any such search are unchanged. *Massey*, 81 Wn. App. at 201. Moreover, while not constitutionally required, the better practice is to state explicitly in sentencing orders the search standards of parolees and probationers. *Massey*, 81 Wn. App. at 201. "The inclusion of such language would apprise parolees and probationers of their rights, insure the protection of those rights, and prevent confusion amongst judges, defendants, and [CCOs] concerning the applicable legal standard." *Massey*, 81 Wn. App. at 201.

Van Deren, C.J. (dissenting) – I respectfully dissent on whether this issue is ripe for our review under *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008). Our constitutional review of community placement conditions "is limited to deciding whether the court abused its discretion in fashioning the order." *State v. Massey*, 81 Wn. App. 198, 200, 913 P.2d 424 (1996). The order at issue requires Wentz and Crutchfield to consent to the community custody officer's (CCO) "visual inspection of all areas of the residence in which the defendant lives and/or has exclusive or joint control or access." Wentz Clerk's Papers at 13.

The majority concludes that Wentz and Crutchfield do not contend that the challenged community supervision condition is too vague to be enforceable. I disagree. Both Wentz and Crutchfield objected to the condition because it would allow searches regardless of whether there were reasonable suspicions that they were violating their sentences. In Washington, vagueness is tested under the federal due process test, which requires that the law or "other legal standard, such as a condition of community placement" provide: (1) adequate notice of the proscribed conduct and (2) adequate standards to prevent arbitrary enforcement. *Bahl*, 164 Wn.2d at 753; *State v. Talley*, 122 Wn.2d 192, 212, 858 P.2d 217 (1993). Article 1, section 7 of our state constitution "requires a well-founded suspicion of a violation . . . to conduct a warrantless search of a probationer . . . released on conditions of probation supervision." *State v. Lucas*, 56 Wn. App. 236, 243-44, 783 P.2d 121 (1989).

Here, the State candidly stated in oral argument that, if asked, the prosecutor would advise CCOs to follow the court's order if they desire to search defendants' homes and that the prosecutor would not advise CCOs that reasonable suspicion that defendants violated a community custody condition form the basis of a valid search. The sentencing order could have

easily adopted the practice of explicitly stating that a reasonable suspicion standard applies to such searches. *See Massey*, 81 Wn. App. at 201. The challenged community custody condition does not incorporate the reasonable suspicion standard that would prevent arbitrary searches of supervised felons' residences. Instead, it allows "a standardless sweep [that] allows [CCOs], policemen [and] prosecutors . . . to pursue their personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974). Accordingly, Wentz's and Crutchfield's objections to the lack of reasonable suspicion as a basis of any CCO search, raises a vagueness challenge that involves a legal question "that can be resolved on the present record." *Bahl*, 164 Wn.2d at 752.

The language of the sentencing order not only allows the CCO unfettered access to Wentz's and Crutchfield's residences but requires them to consent to any search. Accordingly, if a CCO asked for permission to enter any area of their residences and they refused, they would violate the consent condition of the order and the CCO could search their home. *Bahl's* requirements are satisfied under these circumstances: (1) the issue is primarily legal, i.e., whether requiring a person on community supervision to consent to a CCO's search not based on reasonable suspicion is constitutional; (2) there is no need to develop any facts to answer the legal question; and (3) the trial court's order is final.

Additionally, the *Bahl* test requires that we consider "'the hardship to the parties of withholding court consideration.'" *Bahl*, 164 Wn.2d at 751 (internal quotation marks omitted) (quoting *First United Methodist Church of Seattle v. Hearing Examiner for the Seattle Landmarks Preservation Board*, 129 Wn.2d 238, 255, 916 P.2d 374 (1996). Here, defendants will be "'under continual threat of [search],'" which will inevitably alter their behavior and that of

their housemates. *Bahl*, 164 Wn.2d at 748 (quoting *United States v. Loy*, 237 F.3d 251, 258 (3d Cir. 2001)). "'[T]he fact that a party may be forced to alter his behavior so as to avoid penalties under a potentially illegal regulation is, in itself, a hardship.'" *Bahl*, 164 Wn.2d at 747 (quoting *Loy*, 237 F.3d at 257).

Bahl noted that preenforcement vagueness challenges to sentencing conditions "have routinely been reviewed in Washington without undue difficulty" and set out the following policy reason for such reviews: "preenforcement review can potentially avoid not only piecemeal review but can also avoid revocation proceedings that would have been unnecessary if a vague term had been evaluated in a more timely manner." *Bahl*, 164 Wn.2d at 751. Furthermore, whenever we allow the State to wrongfully erode rights guaranteed by our constitutions, even when the rights at issue affect those with some preexisting abridgement of those rights based on their criminal convictions, we reduce the force of the rights for us all.

For these reasons, I would address the substance of the appeals, vacate the unconstitutional community supervision conditions, and require trial courts to specify the need for reasonable suspicion for searching the home of a person on community supervision. I would also vacate any language requiring consent to searches not based on reasonable suspicion.

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Van Deren, C.J.